

University of Chicago Law School

## Chicago Unbound

---

Journal Articles

Faculty Scholarship

---

2015

### Marx, Law, Ideology, Legal Positivism

Brian Leiter

Follow this and additional works at: [https://chicagounbound.uchicago.edu/journal\\_articles](https://chicagounbound.uchicago.edu/journal_articles)



Part of the [Law Commons](#)

---

#### Recommended Citation

Brian Leiter, "Marx, Law, Ideology, Legal Positivism," 101 Virginia Law Review 1179 (2015).

This Article is brought to you for free and open access by the Faculty Scholarship at Chicago Unbound. It has been accepted for inclusion in Journal Articles by an authorized administrator of Chicago Unbound. For more information, please contact [unbound@law.uchicago.edu](mailto:unbound@law.uchicago.edu).

## MARX, LAW, IDEOLOGY, LEGAL POSITIVISM

*Brian Leiter\**

## INTRODUCTION

THIS Article offers an account of Marx's theory of history and his claim that law (and morality) are "ideological," and then asks what theory of law is adequate to explain the way the Marxist theory understands law in both its ideological and non-ideological senses. I will argue that legal positivism, unlike other views about the nature of law, provides a sensible explanation of law for purposes of the Marxist theory of historical change. This latter fact, in turn, gives us another data point in favor of positivism as the only serious explanation of the concept of law, precisely because it is able to explain the concept of law that figures in one of the most important explanatory paradigms in history and the social sciences.

## I. LAW IN THE MARXIST THEORY OF HISTORICAL CHANGE

Both "law" and "morality" are typically denominated as part of the ideological superstructure in the Marxian theory of historical transformation. According to what I will refer to as the "Orthodox Functionalist" version of the theory (most clearly stated in the 1859 Preface to Marx's, *A Contribution to the Critique of Political Economy*, and given systematic exposition by G. A. Cohen in 1978<sup>1</sup>), any socioeconomic order has three important characteristics. First, there is the level of development of the *forces of production*, the means by which human beings produce everything that they need and (at later stages) want.<sup>2</sup> The forces

---

\* Karl N. Llewellyn Professor of Jurisprudence and Director of the Center for Law, Philosophy & Human Values, University of Chicago. I am grateful to Professor David Brink and members of the audience at a meeting of the Central Division of the American Philosophical Association in Chicago in February 2014; and to the participants in the conference on "Jurisprudence and (Its) History" at the University of Virginia School of Law, including Professors Deborah Hellman, David Luban, Gerald Postema, Alice Ristroph, and, especially, Professor Mark Murphy. I have also been helped by an exchange with Professor Charles Barzun and an extensive correspondence with Professor Stefan Sciaraffa about the issues in this Article. Finally, my sincere thanks to Phil Smoke, University of Chicago Law School Class of 2015, for meticulous research assistance.

<sup>1</sup> G. A. Cohen, *Karl Marx's Theory of History: A Defence*, at x (1978).

<sup>2</sup> *Id.* at 32.

of production include human labor power—a relative constant in history, except to the extent that humans grow somewhat taller and stronger over time—and, more importantly, what we may call “technology,” namely, all the tools by which human labor power expands its productive output, from the shovel to the steam engine to the computer.<sup>3</sup> The Marxist theory assumes, not implausibly, that the forces of production grow in productive power over time, and that assumption is crucial to the entire theory.<sup>4</sup>

Second, there are the *relations of production*, which we can, following Professor Jon Elster,<sup>5</sup> think of as the “property rights” characteristic of a particular socioeconomic order. In particular, the crucial question is the distribution of property rights in the forces of production.<sup>6</sup> For example, do persons have property rights in their labor power (as under capitalism) or do others own their labor power (as under feudalism)? Who owns the major forms of technology and mechanical production? In the classic Marxist theory, the “proletariat” own only their labor power, while the “bourgeoisie” own all the other forces of production and purchase the labor power of the proletariat for a survival wage. Under feudalism, feudal lords own *all* the forces of production, including the labor power of serfs as well as their tools.<sup>7</sup> In twenty-first-century capitalism, those who own and sell their labor power often get more than survival wages—law professors are but one example—and while the other forces of production are largely owned by a small number of private individuals, many others have partial stakes (through stock ownership) in small portions of the forces of production.

Third, and finally, there is the ideological superstructure of society, which includes moral, political, legal, and religious ideas. The crucial claim of the Orthodox Functionalist version of the Marxist theory of history concerns the relationship among the three components. According to this theory, what *explains* the content of the ideological superstructure is that it contributes to legitimizing and thus stabilizing the relations of production (it does so by presenting those relations as, *inter alia*, just, fair, natural, inevitable, or some or all of the preceding); and what explains the nature of the relations of productions is that they contribute to

---

<sup>3</sup> Id.

<sup>4</sup> Id. at x–xi.

<sup>5</sup> Jon Elster, *An Introduction to Karl Marx* 106 (1986).

<sup>6</sup> Cohen, *supra* note 1, at 63.

<sup>7</sup> Id. at 65.

2015]

*Marx, Law, Ideology, Legal Positivism*

1181

maximizing the use and development of the forces of production.<sup>8</sup> Historical transformations occur when, in the Marxian metaphor, the relations of production “fetter” the further growth of the forces of production, that is, when the existing scheme of property rights hinders further exploitation and development of new technologies. So, for example, at some point feudal relations of production were incompatible with exploiting forms of production made possible through steam and water power (as well as mechanical tools), thus giving the nascent bourgeoisie an incentive to overthrow the feudal relations of production in order to allow them to effectively exploit these new productive forces.<sup>9</sup>

Note that for jurisprudential purposes, the theory of historical materialism does not need to be true (the theory is highly illuminating, more so than most theories of history, but like every other general theory of all historical change, false); all that is required is that the theory makes claims about the nature of law that are intelligible and not nonsensical, such that it is reasonable to ask what theory of law is compatible with the claims of historical materialism. Marx’s theory easily satisfies that standard.<sup>10</sup> Given that, we need to be able to say *what the law is* in three contexts for the Marxian theory:

- (1) there are the laws that constitute the relations of production, that is, the scheme of property rights in the existing forces of production;
- (2) there are the laws (and associated legal beliefs, for example, “you are entitled to equal protection of the law”) that are superstructural *and* ideological in the pejorative sense; and,
- (3) there are the laws that are non-ideological and superstructural because they characterize the legal relations of a non-class-based, that is, a communist, society.

The last category requires some further explanation. Contrary to Marx’s occasional utopian speculations, there is no reason to think that communist societies would not have both *law* and *morality*. Only the case of law need concern us right now (I will return to the case of morality). As

---

<sup>8</sup> Id. at 28, 31.

<sup>9</sup> Hugh Collins offers a more subtle account of this, but ultimately makes the same point in *Marxism and Law*. Hugh Collins, *Marxism and Law* 21 (1982).

<sup>10</sup> On what is true, and what is probably not true, see Brian Leiter, *The Hermeneutics of Suspicion: Recovering Marx, Nietzsche, and Freud*, in *The Future for Philosophy* 74, 79–80, 84–86 (Brian Leiter ed., 2004).

Joseph Raz argued forty years ago,<sup>11</sup> even a “society of angels” would have need of law: not because angels would ever be inclined to do the wrong thing (angels never need to be coerced), but because even angels need systematic guidance to coordinate their activities effectively in the service of the common good. Angels need to know which side of the road to drive on, which day to put out the recyclable garbage, and how to dispose of their property after their death to those they want to inherit it. Communist societies will be no different, and not because Marx assumes that individuals in such societies will be “angels”; rather, he assumes that, in the absence of the need for constant competition for economic survival, individuals will behave quite a bit differently than they do under capitalism. But such individuals will have the same needs as those in Raz’s “society of angels” (including the need for post-mortem distribution of their property, since communist societies only eliminate personal property in other people’s labor and in the forces of production, including land, but not property in, *inter alia*, your furniture, your heirlooms, and the like).

One suspects that the theory of law adequate to account for the concept of law in its first role in Marx’s theory will be adequate to account for its third role: In these two cases, that norms are *norms of law* does not seem to require any judgment about their merits, favorable or unfavorable. But the second case is different: Calling law “ideological” is, in the Marxian theory, pejorative, though in a sense we will need to specify. Once again, it would seem a theory of law that is neutral on the merits of legally valid norms will have an advantage in explaining the pejorative sense of ideological law. Let us turn then to the notion of ideology.

## II. IDEOLOGY

What makes law or morality “ideological,” in Marx’s clearly pejorative sense of that term? For reasons of both time and space, I am not going to venture into questions of textual interpretation.<sup>12</sup> Instead, I want to

---

<sup>11</sup> Joseph Raz, *Practical Reason and Norms* 159 (1975).

<sup>12</sup> I have found the following instructive: Raymond Geuss, *The Idea of a Critical Theory: Habermas and the Frankfurt School* (1981); Michael N. Forster, *Ideology*, in *The Oxford Handbook of German Philosophy in the Nineteenth Century* (Michael N. Forster & Kristin Gjesdal eds., forthcoming 2015); Tommie Shelby, *Ideology, Racism, and Critical Social Theory*, 34 *Phil. F.* 153 (2003); Jaime Edwards, *The Concept of Ideology* (Ph.D. dissertation in progress, University of Chicago).

focus on what I take to be the philosophically interesting core of the Marxist theory of ideology—I will call it, accordingly, the “Marxian” theory of ideology, leaving for another day the question of whether this is the best interpretation of everything Marx said on the matter.<sup>13</sup>

On the Marxian theory, an “ideology” in the pejorative sense is an inferentially related set of beliefs about the character of the social, political, and economic world that has two characteristics: (1) it falsely represents what are *really* the interests of a particular economic class as being in the general interest (call this “the Interests Mistake”); and (2) the Interests Mistake is possible because those who accept the ideology are mistaken about (or ignorant of) how they came to hold those beliefs (call this “the Genetic Mistake”).<sup>14</sup> What makes a set of beliefs with these characteristics “ideological” in a *pejorative sense* is not simply that it involves mistakes—mistakes are extremely common in the cognitive economy of any person—but that the mistakes affect the *interests* of the agent; that is, they are the kinds of mistakes that anyone concerned about their actual interests would want to correct. And because of that, continued credence in the ideology would not be compatible with understanding its actual genesis, since if those in the grips of the ideology understood the actual causal process by which they came to hold these pernicious beliefs they would no longer accept them. (Why etiology of belief bears on its acceptability is a point to which we will return.)

Here is an example that will help make concrete what is at stake in the Marxian theory of ideology:

A. Members of the “Tea Party” in the United States believe that low taxes are *in the general interest* (meaning, in particular, that they are in the interest of the lower- and middle-class people who make up large portions of the Tea Party).

B. Members of the “Tea Party” are mistaken: Low taxes are not in their interest, since middle- and lower-class people depend on Social Security, Medicare, public schools, public parks, and other facilities

---

<sup>13</sup> Edwards, *supra* note 12, and Forster, *supra* note 12, are better on the interpretive questions.

<sup>14</sup> Geuss gets this almost right in *The Idea of a Critical Theory*, except his “epistemic” sense of ideology is overbroad: The Interests Mistake is not an epistemic mistake except in the trivial sense that it is false; but all ideologies involve false beliefs, and so if an epistemic mistake is not confined to a mistake about justification, the “epistemic” sense swallows all the others. Geuss, *supra* note 12, at 26–30.

that satisfy the needs and desires of most people and that can only be funded at adequate levels if taxes are higher, especially on the wealthy.<sup>15</sup>

C. Members of the “Tea Party” are mistaken about which policies are in their interest because (in part) they are mistaken about how they came to believe (A); that is, they do not realize the extent to which propaganda by the ruling classes led them to their false belief. If they realized the extent to which, for example, billionaires fund advertising and candidates to promote the belief in (A) because it serves the interest of billionaires,<sup>16</sup> they would no longer be able to believe (A).

Nothing depends for our purposes on whether this is correct, though it is *prima facie* plausible. What matters is that it illustrates the conceptual structure of the claim that certain moral, political, or legal ideas might be *ideological*.

### III. LAW AND MORALITY IN THE NON-IDEOLOGICAL SENSE

The preceding account of ideology creates conceptual space for a non-ideological sense of both morality and law in the Marxian theory. That is, moral or legal ideas can be non-ideological insofar as (1) they do not falsely represent the interests of a particular economic class as in the general interest; and/or (2) the acceptability of these ideas does not depend on obscuring their genesis in class-specific interests. If legal or moral ideas do not represent the interests of a particular class as being in the general interest, then it is easy to see why these ideas would not be pejoratively ideological. But the second point is of equal importance, since Marx presents (as we will see) communism as promoting class-

---

<sup>15</sup> The complete account would require a more detailed theory of interests, though for purposes here it is reasonable to assume that human needs and desires of the kind noted will play some role in an account of the interests of persons in the United States.

<sup>16</sup> A good example is the front organization for the Koch Brothers, “Americans for Prosperity,” which advocates for lower taxes on the wealthy and fewer regulations. See Dave Johnson, Meet the Billionaires Using Their Immense Wealth to Make Life Miserable for Ordinary Americans, *Alternet* (Feb. 19, 2014), <http://www.alternet.org/economy/meet-billionaires-using-their-immense-wealth-make-life-miserable-ordinary-americans> listing billionaires that are backing campaigns to lower the budget deficit, cut public employee pensions, control redistricting, give more voting power to the wealthy, and drive down pay for employees). To be sure, billionaires may genuinely believe that these policies are in the general interest, but this false belief is easy to explain given well-known self-serving and wish-fulfillment biases to which humans are subject.

specific interests—the interests of the vast majority—yet does not think communist ideology is an ideology in the pejorative sense. Why not?

Consider, to start, a quite different case. Suppose that we have the empirical science we have because it is in the interests of the ruling class that we have this empirical science. This is *probably* true: Many (maybe all) members of the capitalist class have a powerful economic interest in a correct understanding of the causal laws governing the natural world for obvious reasons, so they have a reason to encourage an epistemically reliable empirical science that gives them the understanding essential for effective, productive exploitation of the natural world.<sup>17</sup> This *fact*—assuming it is a fact—about the genesis of our empirical science would not affect its acceptability, however. The acceptability of empirical science depends on *epistemic* criteria (such as evidential warrant, explanatory power, and predictive success), and not on whether the resulting claims are genuinely in everyone's interest. So it can be true that we have the empirical science we have because it is in the interest of our capitalist overlords, and that fact would not affect the epistemic acceptability of the claims of that science.

Moral and (many) legal claims are different from the claims of empirical science in this regard. If we accept them as legitimate or warranted only because of a mistake about their class-interest-specific genesis, then discovering that fact makes them unacceptable, since moral and legal claims are almost always presented as committed to a basic equality of interests. So, for example, *if* the reason current U.S. free speech doctrine protects unrestricted spending by the wealthy in elections<sup>18</sup> is because this ensures that the political system does the bidding of plutocrats,<sup>19</sup>

---

<sup>17</sup> See Peter Railton, *Marx and the Objectivity of Science*, in *The Philosophy of Science* 763, 769 (Richard Boyd et al. eds., 1991).

<sup>18</sup> *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 319 (2010); *Buckley v. Valeo*, 424 U.S. 1, 23, 45, 64 (1976).

<sup>19</sup> How might that turn out to be the reason—the causal explanation—for why this is current legal doctrine in the U.S.? The mechanism is complex. To start with, the U.S. Supreme Court functions as a super-legislature, something both political parties have understood for a long time, see Brian Leiter, *Constitutional Law, Moral Judgment, and the Supreme Court as Super-Legislature* (Jan. 10, 2015) (unpublished manuscript, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2547972](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2547972)), and thus appointments to the super-legislature inherit the plutocratic biases of the political system as a whole: So, for example, far-right U.S. presidents like Ronald Reagan, George H.W. Bush, and George W. Bush nominate judges friendly to the prerogatives of the ruling classes, while moderate-right U.S. presidents like Clinton nominate judges not hostile to those prerogatives. In addition, of course, there is ample empirical evidence that the super-legislature known as the Supreme Court follows the political currents in



then most people have no reason to affirm the free speech value of unlimited political spending by the wealthy: If free speech is a value, it must be good for everyone, not just the wealthy. (Notice that what is at stake is the moral status or acceptability of the legal claim: The status of the claim *qua* legal does not depend on these considerations.) So, too, with moral prescriptions and proscriptions: In both utilitarian and deontological versions, they present themselves as objective demands not hostage to the interests of particular persons. If the acceptability of such norms depends on obscuring the fact that they serve the interests of only certain persons, then such norms would cease to be acceptable.

To sum up, in the Marxian theory, norms (moral or legal) are ideological insofar as (1) we have the norms we have because it is in the interests of the dominant class that we have them; (2) we are unaware of the truth of (1); and (3) being aware of the truth of (1) is incompatible with continued belief in those norms being acceptable.

The preceding goes a long way towards explaining why Marx consistently presents the communist normative point of view as a class-specific one. (I take Marx to be a kind of consequentialist welfarist with regard to what we would call “moral” questions; that is, he thinks the right thing to do is what would maximize the well-being of the vast majority of humanity. He does not argue for this, since he believes, correctly, that normative theorizing is irrelevant to revolutionary practice: Of course, the vast majority of humanity will be interested in maximizing its well-being!<sup>20</sup> The real aim of theory is to help the vast majority understand the actual obstacles to realizing its well-being Marx describes, for example, “the proletarian movement” as simply being “in the interests of the immense majority.”<sup>21</sup> “The Communists fight for . . . the momentary interests of the working class.”<sup>22</sup> Marx derides the German “True” Socialists (though he might just as well have been thinking of Habermas) for thinking that socialism reflects “the requirements of truth; not the interests of the proletariat, but the interests of Human Na-

---

the country as a whole—for one compelling, qualitative study, see Lucas A. Powe, Jr., *The Warren Court and American Politics*, at xii–xiv (2000)—and thus the extent to which the dominant public culture is shaped by plutocratic interests will manifest itself in the ideas and values that predominate and, in turn, influence the Court.

<sup>20</sup> See Brian Leiter, *Marxism and the Continuing Irrelevance of Normative Theory*, 54 *Stan. L. Rev.* 1129, 1136–37 (2002).

<sup>21</sup> Karl Marx & Friedrich Engels, *Manifesto of the Communist Party* (1848), *reprinted in* *The Marx-Engels Reader* 469, 482 (Robert C. Tucker ed., 2d ed. 1978).

<sup>22</sup> *Id.* at 499.

ture, of Man in general, who belongs to no class, has no reality, who exists only in the misty realm of philosophical fantasy.”<sup>23</sup> And he derides Critical-Utopian Socialists for “consider[ing] themselves far superior to all class antagonisms. They want to improve the condition of every member of society, even that of the most favoured.”<sup>24</sup> And similarly:

The theoretical conclusions of the Communists are in no way based on ideas or principles that have been invented, or discovered, by this or that would-be universal reformer.

They merely express, in general terms, actual relations springing from an existing class struggle, from a historical movement going on under our very eyes.<sup>25</sup>

So the ethical imperatives of the Communist movement represent a class-interest-specific morality, just one in the interests of the vast majority, as opposed to the ruling class. And this morality is *not* ideological because its acceptability also does not depend on its *not* being class-interest-specific—indeed, there is no mistake about its genesis either: “The proletarian movement is the self-conscious, independent movement of the immense majority, in the interests of the immense majority.”<sup>26</sup>

Notice that an upshot of this way of thinking about Marx’s own ethical views is that it follows that the ethical imperatives of the communist movement would not necessarily constitute the morality of a communist society. What such a morality would be is something that will simply have to be discovered in the course of historical developments, since, as Engels says, “all moral theories have been . . . the product . . . of the economic conditions of society obtaining at the time.”<sup>27</sup> Only under communist relations of production would individuals actually discover the morality appropriate to a non-class society. *The same is going to be true of law, I take it.* That is, whatever moral and legal norms are necessary to guide the affairs of a human community in which people are not continuously engaged in the struggle for economic survival, we will discover them under those future conditions (assuming they are attainable).

---

<sup>23</sup> Id. at 494.

<sup>24</sup> Id. at 498.

<sup>25</sup> Id. at 484.

<sup>26</sup> Id. at 482.

<sup>27</sup> Id. at 726.

But both legal and moral norms in such conditions will not be ideological in the pejorative sense that Marx critiques.

#### IV. WHAT THEORY OF LAW IS ADEQUATE TO THE MARXIAN ACCOUNT?

While Marx has, as I suggested above, recognizable ethical views (consequentialist welfarism), he does not advocate for particular legal views. Law is not the instrumentality of communist revolution, obviously. The general Marxian theory does, however, require us to be able to say *what the law is* in three contexts, as noted earlier: (1) we have to be able to identify laws that constitute the relations of production; (2) we have to be able to identify laws (and associated beliefs about the law) that are ideological in the pejorative sense; and (3) we have to be able to identify law that is non-ideological because it characterizes the legal relations of a non-class-based society. Only a positivist theory of law is adequate to these tasks; the best-known non-positivist theory, that of Professor Ronald Dworkin, is not. Indeed, Dworkin is, in Marxian terms, an ideologist, someone who tries to systematize ideological illusions.

A positivist theory of law claims that what law is in any society is a matter of certain complicated psycho-social facts; more precisely, (1) law is whatever satisfies the criteria of the “rule of recognition” characteristic of a legal system, and (2) the “rule of recognition” consists of the criteria that *officials actually apply in deciding what the law is* and which *officials treat as obligatory* (rightly or wrongly). For the Marxian, one virtue of the theory is that it is silent on whether the valid law or the criteria of legal validity are justified, good, obligatory, or authoritative. Thus, a positivist theory can describe (1) the laws that constitute the relations of production, even the relations of production of societies that harm the well-being of the vast majority; (2) law that is ideological in the pejorative sense; and (3) the law characteristic of a non-class-based society. In all three cases, the legally valid norms will be whichever norms are picked out by the rule of recognition (as constituted by the official practice); what distinguishes the three cases will be, respectively, whether (1) the norms are constitutive of the relations of production; (2) the norms are ideological, in the sense defined in the prior section; and (3) the norms are those of a communist society.<sup>28</sup>

---

<sup>28</sup> Why not say, though, that it suffices for Marx’s purposes if we view as “law” whatever norms are enforced by officials, full stop? It is hard to see how this could be an adequate

There are few serious alternatives to the positivist theory of law, despite a voluminous and somewhat notoriously confused secondary literature.<sup>29</sup> Natural law theorists like Professor John Finnis effectively concede the correctness of the positivist theory for the questions it was trying to answer,<sup>30</sup> while others, like Professor Mark Murphy, admit that the only remotely plausible natural law thesis—the “Weak Natural Law Thesis,” according to which *necessarily law is practically reasonable* means something like *normal (or central) instances of law are practically reasonable*—is not obviously incompatible with positivism, as Murphy admits.<sup>31</sup> That latter concession might, however, give Murphy’s view an advantage, even if I am right that the positivist view fits Marxian claims about law. For on Murphy’s view, only *defective* instances of law are practically deficient (that is, morally unacceptable), and one might suppose that, on the Marxian view, it is precisely *capitalist legal systems* that are morally deficient, since they fail to maximize human well-being, and thus a view of law like Murphy’s—which does not reject the posi-

---

general theory of law, for reasons Hart identified, but, more to the point, it is plainly not the case that “ideological” law for the Marxian theory is necessarily enforced: Often its ideological character consists precisely of the fact that while officials cite the norm and employ it for rhetorical flourish, they do not actually enforce it at all. Thanks to Professor Stefan Sciarraffa for a useful correspondence on these issues.

<sup>29</sup> I have come to the view after twenty years as a “professional philosopher” that there is no subfield of Anglophone philosophy as intellectually corrupt and confused as general jurisprudence. There is, to be sure, a serious body of work that arose from Hart’s transformation of the field a half century ago, but then there has been an extraordinary outpouring of fraudulent misrepresentation and rhetorical nonsense. This is partly due to the subfield being small, and partly due to the fact that its two main non-positivist figures were Dworkin (a gifted sophist, in the pejorative sense of the latter term) and Professor John Finnis (a far more responsible scholar than Dworkin, but one whose Catholic dogmatism had a pernicious influence on too much of his work). General jurisprudence is largely moribund as a serious field of inquiry. (I exempt from this charge certain recent interdisciplinary developments in general jurisprudence that are of general philosophical interest, such as work drawing on metaethics and philosophy of language.)

<sup>30</sup> Finnis admits that positivism gives the correct account of “what any competent lawyer . . . would say are (or are not) intra-systematically valid laws, imposing ‘legal requirements.’” John Finnis, *On the Incoherence of Legal Positivism*, 75 *Notre Dame L. Rev.* 1597, 1611 (2000). Finnis complains instead that positivism does not have an adequate answer to questions it was not asking, such as when there is a moral obligation to obey the law. See the critical discussion in Brian Leiter, *Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy* 163–64, 193–94 (2007). Finnis, alas, is a master of quietly changing the topic and the question to make it appear as if he is having a dispute with the positivist.

<sup>31</sup> Mark C. Murphy, *Natural Law Theory*, in *The Blackwell Guide to Philosophy of Law and Legal Theory* 15, 18, 21–23 (Martin P. Golding & William A. Edmundson eds., 2005).

tivist insight, but which acknowledges gradations of law from the “normal” to the “defective”—is actually better suited to the Marxian view. This possibility raises two interesting issues. First, is Murphy’s argument for the Weak Natural Law Thesis—for the idea that there are “defective” and “normal” instances of law—sound? I am skeptical it is, but for reasons that would derail the discussion and which I will confine to a long footnote.<sup>32</sup> Second, even if the Weak Natural Law Thesis were true, it is not clear that the normal-defective distinction it contemplates actually plays a role in the Marxian explanatory theory. After all, on the Weak Natural Law view, *normal* instances of law are morally reasonable, whereas on the Marxian view, no law prior to communism could possibly satisfy the relevant consequentialist welfarist standard: The history of the world, prior to communism, is the history of “defective” instances of law. And that is a problem since, from the standpoint of the explanatory ambitions of the Marxian theory, defective instances of law can serve their ideological functions—for example, legitimizing rela-

---

<sup>32</sup> Murphy notes that it seems sensible to say that normal cheetahs run fast, and thus that a cheetah that doesn’t run fast is a defective instance of the kind of animal a cheetah is. *Id.* at 21. In the case of a biological species, we know how to mark the distinction between normal and defective instances of the kind of biological entity it is: We can appeal to both genetics and to the evolutionary history of the organism to explain why normal members of the kind have both the phenotypic (observable) and genotypic (not observable) properties they have. Biology and genetics will be no help in the case of “law,” as Murphy recognizes. On Murphy’s view, “law’s characteristic . . . is to provide” reasons for action with which subjects have a moral obligation to comply, so a legal system that fails to provide such guidance is a defective instance of law. *Id.* at 27. But why is law the kind of institution that provides morally obligatory reasons for acting? Murphy writes:

[T]he background from which human institutions are to be assessed . . . is one in which humans are properly functioning. But human beings are rational animals, and when properly functioning act on what the relevant reasons require. And so law would not be able to realize the end of order by giving dictates in a world in which humans are properly functioning unless those dictates were backed by adequate reasons. Thus we should say that it is law’s characteristic activity to provide dictates backed by compelling reasons for action, and that law that fails to do so is defective as law.

*Id.* We can grant Murphy’s (dubious) claim that “properly functioning” humans act only on good practical reasons, and yet still object that “to realize the end of order,” law must be the kind of institution that is responsive to how human beings actually are, which is a world in which they are not “properly functioning,” in which they are not “angels.” So what is really crucial to the kind of institution law is is that it is able to guide and structure conduct, and produce order, even in the actual world, where humans are neither particularly rational nor particularly moral.

tions of production—despite being suboptimal from the point of view of Marxian consequentialist welfarism.<sup>33</sup>

If the preceding is correct, then we are left with only one systematically articulated view in the literature that is genuinely antipositivist, namely, that of the late Ronald Dworkin. According to Dworkin, the law is whatever follows from the moral principles that provide the best explanation and justification of law in roughly the positivist sense (that is, the institutional history of the legal system, as I will refer to it).<sup>34</sup> Dworkin's view is not, as it is often presented by casual readers, that “at least in hard cases, [judges] can't merely ‘follow the law,’ because there isn't anything to ‘follow.’ What they have to do is produce a principle that both fits and justifies the existing legal materials.”<sup>35</sup> Dworkin's view is that law, in every case, is whatever would follow from the moral principles that provide the “best” explanation and justification of the pre-existing positive law. Among other things, that means that no one may actually know what the law is, since no one may have identified the moral principle that provides what is *really* the best explanation and justification of the earlier positive law.

For Dworkin, the idea of the best moral justification of the institutional history of the legal system is a *moral realist* (or *objectivist*) one: Given those principles that explain some significant enough portion of the prior cases, statutes, administrative rulings, and so on, the one that *really* provides the best moral justification of the legal system is the one that determines what the law is on a particular question—not the one people around here happen to *think* provides the best moral justification, but the one that *really does*, even if no one knows it. This means that, on Dworkin's view, no norms can be legally valid unless they are above some threshold of objective moral justifiability. Often Dworkin, and especially the handful of Dworkinians still around, tend to be coy on this point. But there is no reason to be coy, since Dworkin himself was explicit that a satisfactory analysis of the concept of law must explain why the exercise of coercive power in accordance with law is morally justifi-

---

<sup>33</sup> Thanks to Professor Mark Murphy for helpful correspondence on this issue, though he should not be presumed to agree with what I say in the text.

<sup>34</sup> Ronald Dworkin, *Law's Empire* 7, 68–70 (1986).

<sup>35</sup> Cass R. Sunstein, *The Most Important Legal Philosopher of Our Time*, Bloomberg View (Feb. 15, 2013, 6:14 PM), <http://www.bloombergvew.com/articles/2013-02-15/the-most-important-legal-philosopher-of-our-time>.

fied.<sup>36</sup> Thus, Dworkin is keen to urge us to acknowledge that for some societies, “in spite of the existence of familiar legal institutions like legislatures and courts,” if “the practices of these institutions are too wicked,” they may not deserve the title of “law.”<sup>37</sup> And he dismisses, without any actual argument, the ordinary view that says if “the Nazis had law,” it was simply “very bad law.”<sup>38</sup> Dworkin dismisses this as a “fact about our linguistic practice”<sup>39</sup> and so not a meaningful constraint on theorizing about the nature of law. Everyone in polite society agrees, of course, that Nazis are not morally justified in coercing people to murder Jews, even under the color of law; but no one other than Dworkin and a handful of Dworkinians think that when the Nazis enacted antisemitic and genocidal laws, they were not really laws. To be sure, we could stipulate that, but then we are doing something different: not trying to figure out what the folk around here mean when they engage in “law talk,” but trying to prescribe when the honorific “law” should attach to certain normative standards. Armchair sociology is even less robust than actual sociology, yet even so, I really have never met anyone who has not fallen through the Dworkinian looking-glass who actually thinks it is an open question whether ordinary lawyers describe the Nazis as having laws, just bad ones.

Notice, now, the problem this creates for a Dworkinian attempt to explain the concept of law in Marx’s historical materialism: For “law,” on Dworkin’s anti-positivist view, cannot fall below some standard of moral defensibility. Start with the nature of the laws constitutive of the relations of production in capitalist society. Whatever precisely Marx thought about the moral status of capitalism, he certainly would not have thought it is morally defensible, either from the standpoint of the class-interest-specific morality of the proletariat or from the standpoint of the morality that will ultimately characterize a communist society. The positivist theory of law has no conceptual difficulty with this: The law constituting the relations of production (that is, the scheme of property rights) is whatever the officials of the system validate as legally binding from an “internal point of view.” That the capitalist officials contribute to wickedness by validating property rights in the labor power of other

---

<sup>36</sup> Dworkin, *supra* note 34, at 190.

<sup>37</sup> *Id.* at 101.

<sup>38</sup> *Id.* at 102.

<sup>39</sup> *Id.*

human beings is not a problem for the positivist theory, but it appears to be for Dworkin.

I suppose the Dworkinian might object that the laws creating capitalist relations of productions are not, in fact, morally objectionable (or do not fall below the threshold of moral acceptability necessary for them to be law) and that Marx is simply mistaken in his appraisal of them. This would be a reasonable response, given the ideological character of Dworkin's philosophy (more on that in a moment). This would require the Dworkinian to defend the objective correctness of bourgeois ethical judgments as against Marxist ones, and since the history of moral philosophy is the history of specious arguments on behalf of differing moral attitudes,<sup>40</sup> one suspects such "defenses" could be mounted. But from the standpoint of theoretical simplicity—still a virtue in theory-construction—it is far preferable to have a theory of law (like the positivist one) that does not need to adjudicate the normative merits of Marxian and Dworkinian views but can nonetheless individuate phenomena crucial to historical explanations.

Dworkin's theory has considerably more difficulty explaining Marx's idea that law is part of the ideological superstructure of society. "Law" is ideological, recall, insofar as it is guilty of the Interests Mistake and the Genetic Mistake. More precisely, certain aspects of the law in capitalist societies are ideological in the sense that their claim to normative authority (not necessarily legal validity) depends on their being perceived as being in the interests of all economic classes *and* on the fact that they are not recognized, correctly, to really be only in the interest of the dominant economic class. Since ideological legal norms fail precisely on the dimension of respect for the equality of interests of persons, they could not possibly be morally justified on a Dworkinian view which treats equality of interests as morally paramount.<sup>41</sup> The Dworkinian view—which collapses legal validity and normative authority—must deny that such norms are really legally valid. But in so doing, it renders incoherent the perfectly intelligible Marxian claim that some of the laws characteristic of capitalist societies are ideological in Marx's pejorative sense.

---

<sup>40</sup> See Brian Leiter, *Moral Skepticism and Moral Disagreement in Nietzsche*, in 9 *Oxford Studies in Metaethics* 126, 131–39 (Russ Shafer-Landau ed., 2014).

<sup>41</sup> See Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* 1–3, 6–7 (2000).



Ironically, perhaps, the Dworkinian view fares best with the status of “law” in communist societies. In communist societies, neither “law” nor “morality” is ideological in character since neither is class-interest-specific and neither depends on ignorance about its genesis for its acceptability. In such a society, it would not be surprising if the legally valid norms (for example, “drive on the right, not on the left”) were also morally justifiable. Of course, the Dworkinian might think that the standards of moral justifiability in a communist society are not, in fact, justifiable from the standpoint of the bourgeois morality Dworkin endorses, and so even in this case the Dworkinian might have trouble explaining legal validity. Certainly nothing in Dworkin’s voluminous writings on issues of equality and politics suggests that he is anything other than a liberal apologist for the capitalist system, and so a loyal Dworkinian probably should conclude that the laws of a communist society are not morally justifiable, and so not really laws. But perhaps if we discount the actual Dworkin’s bourgeois prejudices, it could turn out that legal validity in a communist society might incorporate moral considerations—not class-specific moral considerations, of course, but those characteristics of a non-class-based society—and thus that something like the Dworkinian view (or what Hart took to be the “Soft Positivist” view<sup>42</sup>) prevailed. This would be a somewhat tepid victory for the Dworkinian view, since it would require repudiating the substance of the actual Dworkin’s moral commitments.

#### CONCLUSION

None of what I have argued here should really be surprising. One of the many virtues of the positivist theory of law, as Hart noted more than a half century ago,<sup>43</sup> is that it allows us to pick out an important social phenomenon—normative organization of society by law—that admits of psychological, sociological, economic, and philosophical analysis and critique without prejudging any questions about the value, justifiability, or moral propriety of such organization. Dworkin, by contrast, was always, and obviously, an apologist for the capitalist system in his legal and political philosophy: Various incantations about “equal concern”

---

<sup>42</sup> See H.L.A. Hart, *The Concept of Law* 250–54 (Penelope A. Bulloch & Joseph Raz eds., 3d ed. 2012).

<sup>43</sup> See Hart’s discussion of the “theoretical” virtues of his positivism in *The Concept of Law*. *Id.* at 207–12.

add up to nothing more than a call for more redistributive taxation.<sup>44</sup> Indeed, it is worse than that: We are offered, by Dworkin, the absurd image of the legal community of “integrity” as like an enormous family, in which associative obligations to obey the law arise because of the “equal concern” enjoyed by everyone.<sup>45</sup> Dworkin articulated this vision in the midst of the reactionary “Reagan Revolution” in the United States, when labor unions were busted, progressive taxation was rolled back, laws regulating rapacious capitalists were eviscerated, and America went decidedly “off the rails” as a civilized democracy. In trying to present “law” in these circumstances as above some standard of moral justifiability, Dworkin was the quintessential “ideologist” in the Marxian sense: He told a story about law that obscured, from top to bottom, what was actually happening in the society at large.

The late Professor G.A. Cohen, a brilliant scholar and philosopher, led Anglophone Marxism into Christian moralizing in his late work, as I have argued elsewhere.<sup>46</sup> But he correctly diagnosed the moral hypocrisy of Dworkin (and Dworkin’s friends and colleagues like Thomas Nagel) in his book *If You’re an Egalitarian, How Come You’re So Rich?*<sup>47</sup> The title was a jab at Dworkin, who owned real estate fit for plutocrats in both London and New York while pontificating about equality. The jab was apt for reasons that Nagel himself acknowledged:

I have to admit that, although I am an adherent of the liberal conception [of justice and equality, like Dworkin], I don’t have an answer to Cohen’s charge of moral incoherence. It is hard [as a bourgeois liberal] to render consistent the exemption of private choice from the motives that support redistributive public policies. I could sign a standing banker’s order to give away everything I earn above the national average, for example, and it wouldn’t kill me. I could even try to increase my income at the same time, knowing the excess would go to people who needed it more than I did. I’m not about to do anything of the kind, but the equality-friendly justifications I can think of for not doing so all strike me as rationalizations.<sup>48</sup>

---

<sup>44</sup> Dworkin, *supra* note 41, at 1–2.

<sup>45</sup> Dworkin, *supra* note 34, at 200, 206–08.

<sup>46</sup> Leiter, *supra* note 10, at 79–84, 87–89.

<sup>47</sup> G. A. Cohen, *If You’re an Egalitarian, How Come You’re So Rich?* (2000).

<sup>48</sup> Thomas Nagel, *Concealment and Exposure: And Other Essays* 112 (2002).

This is admirably candid, but it also stands as an indictment of a whole generation of moral and political philosophy in the Anglophone world. More importantly for our purposes, it confirms the ideological character of so much normative philosophical work: Its normative commitments do not affect the practice of those who produce it, and yet its production allows them to advertise an appealing-looking moral seriousness against the backdrop of economic relations which systematically harm the well-being of the vast majority.

Copyright of Virginia Law Review is the property of Virginia Law Review Association and its content may not be copied or emailed to multiple sites or posted to a listserv without the copyright holder's express written permission. However, users may print, download, or email articles for individual use.